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No. 06-1159

IN THE

# Supreme Court of the United States

KAUFMANN'S CAROUSEL, INC., AND LORD & TAYLOR CAROUSEL, INC.,

*Petitioners,*

v.

CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,

*Respondent.*

**On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Fourth Department**

## REPLY FOR PETITIONERS

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## SUPPLEMENTAL RULE 29.6 DISCLOSURE STATEMENT

Kaufmann's Carousel, Inc. is a wholly owned subsidiary of Federated Retail Holdings, Inc., which is 100% owned by Federated Department Stores, Inc., a publicly traded corporation.

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1. Petitioners argued in their petition that "[i]ncreasing a corporation's ability to *finance* new development by re-writing existing contracts to enhance the developer's coffers is simply a naked wealth transfer between well-heeled entities" that cannot be supported by the Public Use Clause. Pet. 12. "There is an obvious and fundamental difference between takings which aid *development* and takings which simply aid a *developer*." *Id.* at 18.

SIDA accepts this characterization of the taking's purpose here, but, remarkably, contends that such a nakedly discriminatory private purpose is a permissible "public use" under the Fifth Amendment. In its Brief in Opposition, the government states that it is free to transfer wealth to its selected private developer—so long as it receives a benefit too. SIDA Br. 19. The government reasons that because it is financing the developer's new shopping mall, "removing impediments that would hinder or increase the expense of such financing plainly benefits SIDA and the development project as a whole." *Id.* SIDA argues, in short, that the government constitutionally may rob Peter to pay Paul, so long as the government partners with Paul and shares in Paul's windfall.

This argument would make the Public Use Clause a nullity. As this Court emphasized in *Kelo*, "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Justice Kennedy, in fact, expressly noted in his *Kelo* concurrence, where there is just a "*risk* of undetected impermissible favoritism of private parties," the Constitution may require an irrebuttable presumption of invalidity. *Id.* at 493 (Kennedy, J., concurring) (emphasis added). This impermissible favoritism to one private entity is hardly *cured* because the government *shares* in the favored entity's windfall. A wealth transfer from *A* to *B* does not become acceptable

because the government favors the entity in which it has a preexisting economic stake.

To the contrary, the fact that the private favoritism is motivated by the government's parochial fiscal interests, rather than a neutral policy justification, exacerbates the constitutional problem. As the petition pointed out, this Court has repeatedly held that the government's use of its sovereign powers to further its monetary goals is illegitimate and inherently suspect. Pet. 17-19. This is a discussion that neither Respondent attempts to dispute or to distinguish. Furthermore, the Takings Clause, like the rest of the Bill of Rights, *limits* the *government's* power—it does not provide justification for the government to *increase* its power and to further its *own* benefit at the expense of a selected few. The government is not supposed to benefit from its confiscation of property; the Constitution, through the Just Compensation Clause, is designed to ensure that it does not. *See, e.g.*, *Olson v. United States*, 292 U.S. 246, 255 (1934) ("The public may not by any means confiscate the benefits . . . of the owner's bargain.").

Even more brazenly, SIDA contends that the Court may not even examine the taking's purpose because it is constitutionally irrelevant. SIDA Br. 20. Under the government's view, this Court may only ask whether the overall project is beneficial to the public. *See id.* at 19. The government contends the purpose of any individual taking is a matter of state law, so the Constitution and this Court have *no* role in assessing the "necessity and scope of a potential taking," and may not inquire whether the specific property confiscations serve any public purpose. *Id.* at 20.

This argument cannot be reconciled with the Constitution's text or this Court's precedent. The constitutional question is whether the "*taking*" serves a "public use" and the "taking" here rewrites Petitioners' contracts to benefit the favored private developer. If this taking of private contract rights serves no public purpose, it

is impermissible regardless whether the project would be beneficial. As this Court reaffirmed in *Kelo*, the government may not use the pretext of a public purpose "when its actual purpose was to bestow a private benefit."[1] *Kelo*, 545 U.S. at 478.

Here, the "takings" were not needed to develop the property, but simply to financially benefit the developer, which is not a public purpose. The government's so-called "impediments" at issue here, *see* SIDA Br. 19—otherwise known as Petitioners' property rights—are not provisions that would preclude the developer from expanding its mall. The mall could be built in exactly the same way, whether or not Petitioners' rights were confiscated. The government does not and cannot contend otherwise. The contractual rights that were taken merely protect Petitioners from the developer arbitrarily imposing new financial burdens. For example, they cap the amount of PILOT payments that may be imposed on Petitioners and prohibit the developer from mortgaging Petitioners' buildings or using them as collateral. Pet. App. 13a-14a. These rights are no different than the standard rights in a home mortgage which set a fixed monthly payment and protect a homeowner from the bank using the home as collateral in other transactions.

The government has no legitimate public purpose in conscripting its citizens into a private developer's servitude by allowing a private developer to use citizens' property as collateral for a shopping mall and to unilaterally increase the amount of payments they must make. It is inconceivable, for example, that the Court would have allowed the government to rearrange Ms. Kelo's mortgage so that Pfizer could use

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[1] This petition has nothing to do with whether one of the "twigs in the bundle of rights that is property" can be plucked out, as the government suggests. SIDA Br. 18. Petitioners' point is that *no matter* the nature of the property taken, it must be taken for a public use.

her home as collateral in its project or to increase her monthly payments.

2. The government's arguments and the state court decisions here cannot be squared with this Court's precedent, including *Kelo*. No matter how the government attempts to spin the struggles of the lower federal and state courts, the courts have evidenced a great deal of confusion regarding the appropriate legal standard to apply to government self-dealing and the required connection between the government's taking and the purported public interest. These courts have relied on this Court's opinions interpreting the federal Constitution, *see, e.g.*, *Didden v. Village of Port Chester*, 173 F. App'x 931, 933 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1127 (2007); *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 96 (R.I. 2006), and have reached irreconcilable decisions.[2] Simply because the precise factual situation has not occurred—no other state entity has acted as boldly or unapologetically as SIDA—does not suggest there is no split of authority or confusion regarding the legal standards underlying the Takings Clause. *See* SIDA Br. 11. Every case has different facts; the important question is which legal standards are appropriate and whether the results under those standards can be reconciled. The cases cited by Petitioners evidence such confusion and demonstrate the need for this Court's action. Pet. 22-26.

3. Respondents attempt to obfuscate the merits of the petition by focusing on perceived "vehicle problems," contending Petitioners ought to have more clearly raised their constitutional claims. Petitioners, however, provided the New York state courts a fair and full opportunity to

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[2] The Respondents themselves can not even agree on the meaning of these cases. SIDA contends that *Didden* did not reach the issue of a taking, *see* SIDA Br. 13-14, whereas Carousel Center asserts that *Didden* "presented the constitutional question alleged here." *See* Car. Ctr. Br. 9.

address the constitutional issues raised by SIDA's actions, and in fact, the Appellate Division did address these issues. *See* Pet. App. 36a-38a. Nothing more was required. *See Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) (The Court's jurisdiction "does not depend on citation to book and verse."). As this Court has held, to preserve a constitutional challenge, "no particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980) (internal quotation marks omitted). In such cases, "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Id.* (internal quotation marks omitted).

This Court, for example, has concluded that federal due process claims were preserved even where the argument was presented solely in terms of state law to the state court. *See Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981) (even though the claim "was not raised on appeal below or included as a question in the petition for certiorari," the issue was pointed out to the trial court, and the petitioner's adversary was on notice). Likewise, in a takings case, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), generalized "due process" arguments under "the Florida Constitution and its Federal counterpart," which persuaded the Florida Supreme Court to find "no unconstitutional taking," were "a sufficient base for this Court's consideration of the federal issue." *Id.* at 159 n.5 (internal quotation marks and emphasis omitted). Petitioners' federal claims were presented at least as well as these cases.

The only reason the constitutional issues were not more cleanly raised and addressed was because of state law which purported to bar, without exception, Petitioners from raising the constitutional arguments after the government specified the property it was going to take. *See* N.Y. E.D.P.L. § 208; Car. Ctr. Br. 4; SIDA Br. 11. New York requires a

trifurcated procedure when the government takes property. In the first phase, the government must determine the need for the project, including the public use to be served. *See* N.Y. E.D.P.L. §§ 203, 204. The government need not specify the property interests that are being taken; it merely must justify the overall project itself. All constitutional challenges must be made in this proceeding, even though a property owner does not know exactly what property interests the government will try to take. *See id.* § 207. In the second phase, the government defines the property that will be taken by filing an acquisition map, which effects transfer of title, but precludes constitutional challenges to the specific taking. *See id.* §§ 208, 402. In the third phase, just compensation is determined and awarded.[3] *See id.* §§ 501-514.

The history here demonstrates that Petitioners did everything they could within this procedure to challenge SIDA's taking. In 2002, in the first proceeding, Petitioners and co-plaintiff, J.C. Penney Corp., argued that the developer's proposed mall expansion would not serve a public purpose. J.C. Penney expressly contended the taking violated the federal Constitution, and Petitioners contended that the public use requirement in the EDPL, which cannot be interpreted less restrictively than the Constitution's Public Use Clause,[4] was not served, *see* J.C. Penney App. Div. Br. at 19-21; Petrs.' App. Div. Br. at 30-33 (July 22, 2002); Petrs.' App. Div. Reply Br. at 7-10 (Sept. 11, 2002). These arguments were both addressed and rejected by the New

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[3] These proceedings, which build on one another and must follow in this sequence, are far from "completely separate and independent proceeding[s]" as Carousel Center asserts. Car. Ctr. Br. 5.

[4] *See Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 482 (N.Y. 1994) ("The precedents, State and Federal, thus establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the Supremacy Clause.").

York Appellate Division, which understood that SIDA was seeking to take consent rights, *i.e.*, those rights that prohibited the DestiNY project from proceeding.[5] *See* Pet. App. 36a-38a. Petitioners and J.C. Penney thereafter sought relief in the Court of Appeals—J.C. Penney sought such appeal as a matter of right but the Court of Appeals denied the application presumably for lack of a colorable constitutional claim. *See id.* at 10a. The state courts thus not only had the opportunity to address the constitutional issues, the appellate court actually did address the issues and the Court of Appeals rejected them as meritless. No petition was filed with this Court because, as the rights to be taken were not specified, the claim was not ripe for federal review. *See, e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (explaining that Takings Clause challenges should be raised "in an actual factual setting that makes such a decision necessary") (internal quotation marks omitted).

Following this Court's decision in *Kelo*, in the second phase, SIDA specified the contractual rights that it was taking. In addition to the consent rights, SIDA for the first time sought to take certain financing provisions, which had nothing to do with the ability to expand the developer's shopping mall and served only to reduce the developer's costs of borrowing. *See* Pet. 8-11; Petrs.' App. Div. Br. at 14-19 (arguing that SIDA's current attempted takings "encompass interests far in excess of [those] referenced in SIDA's 2002 Determination and Findings and far in excess of the interests for which any showing of public necessity has been made"). As noted *supra*, New York law precluded Petitioners from reasserting the constitutional claims raised in the first instance, and thus Petitioners could only contend

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[5] Under New York law, an issue of law is preserved for review so long as the lower court addresses it. *Seitelman v. Lavine*, 325 N.E.2d 523, 525 n.2 (N.Y. 1975); *Servidori v. Mahoney*, 515 N.Y.S.2d 328, 329 (App. Div. 1987).

that the prior findings and determinations did not justify taking these rights.[6] Had Petitioners succeeded, they would have been entitled to another constitutional hearing before their rights were taken. But the Appellate Division rejected Petitioners' arguments and held SIDA's inclusion of the financial provisions "d[id] not exceed SIDA's 2002 determination and findings." Pet. App. 3a. This determination necessarily reaffirmed the constitutional holding in the context of the specific property rights at issue, and for the first time established a fully ripe federal claim.[7]

Petitioners again raised their constitutional claims in their appeal to the Court of Appeals in 2006, pointing to the taking in this case as unjustified even under the standard of *Kelo*. Pet. 11; Petrs.' Mot. for Leave to Appeal at 15-18 (Oct. 4, 2006). That Petitioners sought leave to appeal rather than filing an appeal as a matter of right was not an "admission" that their arguments did not raise any constitutional claims, as Respondents assert, but rather was dictated by New York law: where a decision involves constitutional and non-constitutional grounds for review, an appellant *should* seek leave to appeal rather than appeal as a right to avoid outright dismissal. *See Winters v. Lavine*, 574 F.2d 46, 61-63 (2d Cir. 1978) (holding that appellant waived constitutional argument by attempting to appeal as matter of right when non-constitutional grounds were also involved

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[6] Under the law of the case doctrine, the Appellate Division also was precluded from reconsidering its constitutional decisions once it rejected Petitioners' state law claims. *See Telaro v. Telaro*, 255 N.E.2d 158, 159-60 (N.Y. 1969). Nevertheless, Petitioners did argue that SIDA's proposed actions would be "defective *and* unconstitutional." Petrs.' App. Div. Br. at 14, 19 (July 13, 2006) (emphasis added).

[7] Petitioners need not wait until the third phase to seek federal review because all of the facts necessary for review of "public use" have been established. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

and noting that appellant could have "presented anew the first amendment issue on [a permissive appeal] to the Court of Appeals"); *see also* N.Y. JURIS., *Appellate Review* § 74 (2d ed. 2007) ("[W]here there is any doubt whether a constitutional question is the sole point involved, sound practice warrants an application for permission to appeal."). Such a procedure was particularly appropriate here because an appeal as a matter of right would have been futile. The Court of Appeals had already rejected an appeal as of right, and state law purported to prohibit constitutional challenges in the second proceeding.[8] Pet. App. 10a, 18a. Contrary to Respondents' claims, the chosen procedure was the most appropriate procedure and actually increased the chance for additional state court review of the constitutional issues.[9]

Finally, any failure to preserve the precise issues at hand was due to the inadequate state procedures, which cannot deny this Court review. This Court will disregard allegedly independent state grounds when the state rules in question have not afforded "a reasonable opportunity to assert federal rights, without placing unreasonable obstacles in the way." 16B Charles A. Wright, et al., *Federal Practice and Procedure* § 4027, at 392 (1996 & 2007 update); *see also Lee v. Kemna*, 534 U.S. 362, 376 (2002) (rejecting state rules as inadequate state grounds to bar review of federal due process claim); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those

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[8] *Parker v. Illinois*, 333 U.S. 571 (1948), is not applicable. There, the petitioner made "a choice which involved abandonment of the constitutional issues which he had raised in the proceedings." *Id.* at 575. Petitioners, as demonstrated above, did not abandon their claims under New York law by their choice of procedure.

[9] Contrary to the government's, again, unfounded suggestion, this Court regularly grants petitions for certiorari to review decisions from state intermediate appellate courts. *See, e.g., Cunningham v. California*, 127 S. Ct. 856 (2007) (Court of Appeals of California).

who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."). New York law falls in this category of inadequate procedures, as it prohibited Petitioners from challenging, in Carousel Center's words, the "scope" of the taking. Car. Ctr. Br. 1, 4. If this state rule is viewed as precluding constitutional challenges to the specific, completed taking, as Respondents maintain, it would effectively insulate the "scope" of every government taking from federal review. By the time the taking's "scope" becomes sufficiently clear to be ripe for federal review, under Respondents' niggardly interpretation of state law, it is too late to raise the constitutional challenge. This plainly cannot be. The government's transparent effort to distract the Court from the merits of the petition should be rejected.[10]

A clear constitutional error occurred here. Governments, as demonstrated by SIDA's Brief in Opposition, have become emboldened after *Kelo* to expressly further their own interests and the interests of selected private parties to the detriment of a few. These questions of immense national importance should be resolved now without waiting for the repeated trampling of constitutionally protected rights, which can never be restored.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] SIDA further attempts to confuse the issue by suggesting in a footnote that Lord & Taylor lacks standing. First, there is no dispute that Kaufmann's has standing and can assert the claims raised. This court thus has jurisdiction over the petition. Second, New York and federal rules do not require the substitution of a party after a transfer of interest. N.Y. C.P.L.R. § 1018; FED. R. CIV. P. 25(c); FED. R. APP. P. 43. Finally, Counsel spoke to the Clerk's Office regarding this issue and was told no additional action was likely necessary, but that the Clerk's Office would inform Counsel if it was.

Respectfully submitted,

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